TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 409 267 74

HALL AND BLASLAND ET AL., APPELLANTS,

vs.

JOHN A. ALLEN, ASSIGNEE OF WILLIAM DOWNING, BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

FILED OCTOBER 24, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 499.

HALL AND BLASLAND ET AL., APPELLANTS,

vs.

JOHN A. ALLEN, ASSIGNEE OF WILLIAM DOWNING, BANKRUPT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

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1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the April term thereof, A. D. 1870.

Appeal from U. S. district court for eastern district of Missouri.

IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } In bankruptcy.

JOHN A. ALLEN, ASSIGNEE, &C., APPELLANT. HALL & BLASLAND ET AL., APPELLEES. }

Be it remembered that heretofore, to wit, on the seventh day of April, A. D. 1870, there was filed in the office of the clerk of the circuit court of the United States for the districts of Missouri a transcript of the record and proceedings had in the above-entitled cause in the district court of the United States for the eastern district of Missouri; which transcript is in the words and figures following, to wit:

Transcript from district court.

In the district court of the United States for the eastern district of Missouri.

IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } No. 784.—In bankruptcy.

Be it remembered that, on the first day of April, A. D. 1870, the following proceedings were had in said district court in the above-entitled matter, to wit:

2 IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } No. 784.—In bankruptcy.

Order allowing appeal to circuit court.

At St. Louis, in said district, Friday, 1st April, A. D. 1870.

This day come, by their respective attorneys, John A. Allen, assignee of the estate of said bankrupt, and Hall & Blasland et al., creditors of said bankrupt, the parties to the question arising on the motion and agreement of facts heretofore certified by the register in charge of this case for the opinion of this court thereon. And said John A. Allen, assignee aforesaid, by his attorney, moves the court for leave to appeal to the circuit court of the United States for the districts of Missouri, to reverse the decision heretofore rendered by this court on said question, motion, and agreement of facts, which leave is granted.

And thereupon said assignee files his bill of exceptions to said decision, and also a stipulation in writing, signed by the attorneys for said creditors, agreeing to said bill of exceptions, and waiving an appeal bond herein; which bill of exceptions is signed and sealed by the judge of this court, and ordered to be made part of the record in this case.

And thereupon it is ordered that a transcript of the record and proceedings herein be certified to the said circuit court.

And the said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA, *Eastern District of Missouri:*

In the district court of the United States for said district.

IN THE MATTER OF WILLIAM DOWNING, AN INVOLUNTARY BANKRUPT. } In bankruptcy.

3 Be it remembered that, in the course of the proceedings in bankruptcy in this cause, in said district court, the following question, motion, and agreement of facts was certified into court, for the opinion of the judge thereon, by the register, Lucien Eaton, esquire, to whom this case had been referred.

IN THE MATTER OF WILLIAM DOWNING, A BANKRUPT. } Before Lucien Eaton, esq., register.

Now come Hall & Blasland, John Woolridge & Co., Daniel Howard, E. Downing, E. Walcott & Co., John Hill & Co., Warren Sawyer & Co., Loring & Searl, L. Blanchard, Thayer & Brother, Lyman Dike, J. R. Kimball & Co., McRay & Pinell, E. C. Baily, Holbrook, Hobert & Porter, Crain, Wemick & Co., S. M. Babier, Poor & Wheeler, Boyd, Corey & Co., John D. Pike & Co., Ada R. Keith & Co., & P. M. Copland & Co., all creditors of William Downing, by Sharp & Broadhead, their att'ys, and state that they are the creditors of William Downing individually; that the debts due them were contracted by William Downing alone; that, prior to the contracting of said debts, the said Downing was doing business with R. W. Emmerson, under the firm name and style of Downing & Emmerson; that Downing & Emmerson dissolved partnership in December, 1868, owing large sums of money to various persons; that the firm of Downing & Emmerson, at the time of such dissolution, was insolvent and unable to pay their debts; that Downing purchased from said Emmerson his interest in the stock on hand and in the assetts of Downing & Emmerson; that Downing agreed with Emmerson that he would pay the debts of the said firm of Downing & Emmerson; that said Downing, after said dissolution of the firm of Downing & Emmerson, commenced the business of merchandizing on his own account in the early part of the year 1869, and, whilst doing business on his own account, and in his individual capacity, con-
4 tracted the debts due the above-named parties; that a large portion of the debts due by Downing & Emmerson remained unpaid at the time the said William Downing was declared a bankrupt; that the firm of Downing & Emmerson, from the time of its dissolution up to the time William Downing was declared a bankrupt, was and still is insolvent, and that the said William Downing, from the time of said dissolution, and up to the time he was declared a bankrupt, was insolvent; that a large number of the claims proved against the estate William Downing, bankrupt, were debts due by the firm of Downing & Emmerson before its dissolution, and are still due by said firm, the said last-named creditors never having released their claims against the said Emmerson; that the said claims have been proved up by said last-named creditors as partnership debts; that no proceedings in bank-

ruptcy have ever been instituted against the firm of Downing & Emmerson, although the said firm was insolvent at the time of its dissolution. It is therefore insisted that the individual creditors of William Downing, above named, have the legal right to have their claims as proven first paid out of the assets of William Downing before any part of said assets can be applied to the payment of the partnership debts of Downing & Emmerson, and that the assignee should be directed to make such distribution of said assetts.

SHARP & BROADHEAD.

That the bankrupt William Downing and Richard W. Emmerson were copartners under the firm name of Downing & Emerson, and, as such, dealers in boots and shoes in the city of St. Louis previous to December, 1868, on which day they dissolved by consent, Downing taking or purchasing the stock of goods and other assets of the firm, and
5 agreeing to pay off and discharge all of its liabilities, and executing and delivering to Emerson, for his Emerson's supposed interest in the concern, his notes amounting to about $40,000; that said firm was then largely indebted and insolvent; that Downing, after the dissolution aforesaid, continued, in his individual name and for his individual account, to prosecute the said business at the same place until the sixteenth day of August, 1869; that, while so doing business alone, the said Downing, in the regular course of business, disposed of part of said stock of goods, added to it by further purchases, paid off some of the liabilities of said firm, and contracted further liabilities and debts in his own name alone; that, on said sixteenth day of August, 1869, said Downing executed a conveyance (which is in file in this cause) of all his assets, including the assets of said firm, to John W. Kennan for the benefit of all the creditors of himself and said firm; that said Kennan thereafter disposed of said stock of goods, realizing about $60,000 therefor, and, when he had so disposed of it, the said Downing was proceeded against and adjudicated a bankrupt by this court, and that said Kennan paid over to the assignee in this cause the said proceeds of the sale of said stock, which amount of money is now to be divided; that the said copartnership of Downing & Emerson has never been adjudicated bankrupt as such, nor have the persons holding claims against it released the said Emerson from liability thereon, but that said Emerson has also been adjudicated a bankrupt in the State of Massachusetts; that claims against said bankrupt Downing individually, as well as claims against him as one of the said copartnership of Downing & Emerson, have been proven and allowed against his estate without
6 any distinction, except so far as the evidences of debt upon which they were proved would show any, and that all these creditors voted for the said assignee in this case; and that, before he was adjudicated a bankrupt as aforesaid, and after the sixteenth of August, 1869, the said Downing executed and delivered to each one of the creditors of Downing & Emerson an agreement in the following form, to wit:

"Whereas the firm of Downing & Emerson, which was composed of William Downing and Richard W. Emerson, was in the month of December, A. D. eighteen hundred and sixty-eight, dissolved:

"And whereas said Emerson assigned to said Downing all his, said Emerson's, interest in the property and assets of said firm, and said Downing in consideration thereof gave said Emerson certain promissory notes, and agreed to assume and pay all the liabilities and debts of said firm of Downing & Emerson, and hold said Emerson harmless from the

same, and I have agreed to pay the debts and liabilities of said firm as my own private individual debts, and the party with whom the agreement is made may now have debts and claims against said firm :

Now therefore I, the said Downing, for value received by me of the receipt whereof is hereby acknowledged, do hereby covenant and agree with said , that I individually will pay, as my own private and individual debt, all and singular the debts, liabilities, and claims against said firm of Downing & Emerson held by said

"Witness my hand and seal this day of September, A. D. eighteen hundred and sixty-nine."

It is now claimed by the creditors of William Downing, who contracted with him individually, that they alone are entitled to share in the division of said fund, on the theory that they are individual creditors, and as such are alone entitled to be paid out of said fund
7 as individual estate, while on the other hand the creditors of William Downing, who contracted with him as a copartner of Emerson, claim that they alone are entitled to share in such division on the theory that they are partnership creditors, and that said fund is partnership property, it having come from said partnership originally, and having formed the capital with which said Downing was enabled to continue to do business after the dissolution of said firm ; and all parties reserve the right of appeal.

HITCHCOCK & LUBKE, *for Assignee.*
SHARP & BROADHEAD,
Att'ys for certain individual creditors of William Downing for debts contracted since dissolution of the firm of Downing & Emmerson.

In the district court of the United States for the eastern district of Missouri.

IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } In bankruptcy.

EASTERN DISTRICT OF MISSOURI, *ss :*

I, Lucien Eaton, one of the registers of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said cause before me, the following question arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit, Hitchcock & Lubke, esqs., who appeared for the assignee, and Sharp & Broadhead, esqs., who appeared for the creditors of said bank-
8 rupt. The creditors of William Downing individually, represented by Sharp & Broadhead, filed the motion in writing hereto annexed, and thereupon the parties submitted the agreed statement of facts annexed, signed by counsel. The question proposed is, whether, on the facts submitted, the motion should be sustained or not. As the parties have not argued the matter before the register, & wish to argue the matter before the court, the register has not deemed it incumbent on himself, unaided by counsel, to express an opinion. And the said parties requested that the same should be certified to the judge for his opinion thereon.

Dated at St. Louis this 23rd day of March, A. D. 1870.

LUCIEN EATON,
Register in Bankruptcy.

And thereupon, on the 25th day of March, A. D. 1870, the said question was argued by counsel, and the court gave the following opinion thereon:

Opinion.

Upon the facts submitted the court rules that the separate creditors of the bankrupt must be first paid in full before the partnership creditors can receive any dividend from the funds in the hands of the assignee.

SAMUEL TREAT, *Judge.*

To which decision and ruling of the judge of this court the assignee of the estate and effects of said bankrupt in this behalf excepted, and assigned as error that the said opinion should have been that all the creditors of said bankrupt who had proved their claims before the said register, and were registered as such, were entitled to share equally in the distribution of said estate of said bankrupt, whether such
9 creditors had proved claims against the said bankrupt individually or claims against him as a copartner with Richard W. Emerson; or that the said opinion should have been that there should be a separation of that part of the estate of said bankrupt acquired by him from the copartnership of Downing & Emerson alone should be entitled to share in the distribution of that part thereof; which exception and assignments of error are now preserved at the request of said assignee by this bill of exception, signed & sealed by the judge of this court this first day of April, A. D. 1870.

SAMUEL TREAT. [SEAL.]

And the said stipulation, filed on the first day of April, A. D. 1870, is in the words and figures following, to wit:

Stipulation as to appeal from question certified by register.

In the district court of the United States for the eastern district of Missouri.

IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } Case No. 784.

We do agree to the annexed bill of exception, and do waive an affidavit and bond, except bond for costs necessary to enable the assignee to perfect an appeal to the circuit court of the United States for the districts of Missouri.

April 1st, 1870.

SHARP & BROADHEAD,
Att'ys for certain seperate Creditors.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Benjamin F. Hickman, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby cer-
10 tify the writing hereto annexed to be a true copy of the record and proceedings in the matter of William Downing, bankrupt, in bankruptcy, relating to the question arising on the motion and agreement of facts certified by Lucien Eaton, one of the registers in bankruptcy of this court, for the opinion of said court, to which question

John A. Allen, assignee of said bankrupt, is one party, and Hall and Blasland et al., creditors of said bankrupt, are the other parties, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this second day of April, in the year of our Lord eighteen hundred and seventy.

[SEAL.]

BEN. F. HICKMAN,
Clerk of said Court.

It is agreed that the bankrupt Downing was declared a bankrupt upon the petition of a creditor who held a claim against him individually.

HITCHCOCK & LUBKE,
For Assignee.
SHARP & BROADHEAD,
For certain individual Creditors.

And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis on Monday the 4th day of April, A. D. 1870, the following further proceedings took place
11 in said cause on Thursday, the 21st day of April, A. D. 1870, to wit:

Cause heard and taken under advisement.

IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } In bankruptcy.

JOHN A. ALLEN, ASSIGNEE, &C., APPELLANT.
HALL & BLASLAND ET AL., APPELLEES.

Appeal from U. S. district court for eastern district of Missouri.

This day come the parties by their respective solicitors, and this cause having been brought on for hearing at the present term of this court, and the same having been this day fully heard, argued, and submitted to the court for a decree upon the record and proceedings in the district court of the United States for the eastern district of Missouri, and upon the cause, as made out and presented to this court, and the court not being fully advised of and concerning the premises, said cause is by the court taken under advisement.

MEMORANDUM.—His honor Judge Treat did not sit or take part in the proceedings in said cause.

And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause on Tuesday, the 26th day of April, A. D. 1870, to wit:

Opinion and judgment of circuit court.

IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } In bankruptcy.

JOHN A. ALLEN, ASSIGNEE, &C., APPELLANT. }
HALL & BLASLAND ET AL., APPELLEES. }

Appeal from U. S. district court for eastern district of Missouri.

This day come again the parties by their respective solicitors, and this cause having been heard & submitted at a former day of this term, and having been taken under advisement by the court, and the court, being fully advised of and concerning the premises, now renders the following opinion and judgment:

12 Upon the facts submitted this court is of the opinion that all of the creditors of the said bankrupt who had proved their claims before the register were and are entitled to share pro rata in the distribution of the estate of the bankrupt, whether their debts were originally against the firm of Downing & Emerson or against the said Downing individually. This court is therefore of opinion that the court below erred in holding that the individual creditors of Downing were entitled to priority, and its judgment is reversed, and the assignee ordered to make an equal distribution of the estate among all the creditors whose claims have been duly established and registered.

And it is further ordered that the said appellees pay the costs of the appeal of this cause from said district court, and that execution be issued for such costs.

MEMORANDUM.—His honor Judge Treat did not sit or take part in the disposition of said cause.

And afterwards, to wit, at a regular stated term of the said circuit court, begun and holden at the city of St. Louis on Monday, the 4th day of April, A. D. 1870, the following further proceedings took place in said cause on Tuesday, May 17th, A. D. 1870, to wit:

Order allowing appeal and approving bond.

IN THE MATTER OF WILLIAM DOWNING, BANKRUPT. } In bankruptcy.

JOHN A. ALLEN, ASSIGNEE, &C., APPELLANT. }
HALL & BLASLAND ET AL., APPELLEES. }

Appeal from U. S. district court for eastern dist. of Mo.

This day come the said appellees, Hall and Blasland et al., by their solicitors, and move the court for leave to appeal to the Supreme Court of the United States from the opinion and judgment rendered by this court in this cause, which appeal is allowed.

13 And thereupon said Hall and Blasland et al. present to the court their bond of appeal in said cause in the sum of ten thousand dollars, executed by Samuel A. Blasland, as principal, and James Blackman and Frank H. Wenrich, as sureties; which bond is approved and ordered to be filed of record in this cause; and it is further ordered that the record and proceedings in said cause be certified and transmitted to said Supreme Court.

Which bond referred to in the last foregoing order is as follows, to wit:

Bond of appeal.

Know all men by these presents that we, Samuel A. Blasland, as principal, and James Blackman and Frank H. Weinrich, as sureties, are held and firmly bound unto John A. Allen, assignee in bankruptcy of William Downing, bankrupt, in the full sum of ten thousand dollars, to be paid to said John A. Allen, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 17th day of May, A. D. 1870.

Whereas lately, at the April term, A. D. 1870, of the circuit court of the United States for the districts of Missouri, in a matter of controversy depending in said court between John A. Allen, assignee aforesaid, and Hall and Blasland et al., judgment was rendered against the said Hall and Blasland et al.; and the said Hall and Blasland et al. having taken an appeal from said judgment to the Supreme Court of the United States:

Now, the condition of the above obligation is such, that if the said Hall and Blasland et al. shall prosecute their said appeal to effect, and
14 without delay, and shall answer all damages and costs that shall be adjudged against them if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

SAMUEL A. BLASLAND. [SEAL.]
JAMES BLACKMAN. [SEAL.]
FRANK H. WENRICH. [SEAL.]

Signed and delivered in presence of—

Approved by—

SAMUEL TREAT, *Judge.*

15 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Benjamin F. Hickman, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a copy of the record and proceedings in chancery, appealed from the United States district court for the eastern district of Missouri to said circuit court, wherein John A. Allen, assignee in bankruptcy of William Downing, bankrupt, is appellant, and Hall & Blasland et al. are appellees, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said districts, this twenty-fourth day of June, in the year of our Lord eighteen hundred and seventy.

[SEAL.] BEN. F. HICKMAN,
Clerk of said Court.

(Indorsement on cover:) No. 499. Hall & Blasland et al., appellants, vs. John A. Allen, assignee of W'm Downing, bankrupt. Missouri C. C. U. S.

Filed 24th October, 1870.

5 Lab. Rd
100 Duncan Ave
Jund Bldg

Supreme Court of the United States.

OCTOBER, 1871.

HALL & BLASLAND ET AL., Appellants,
vs.
JOHN A. ALLEN, Assignee of William Downing, Bankrupt.
No. 267.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

The following are some of the leading facts stated in the record, viz:

That William Downing, the bankrupt, prior to December, 1868, was a member of the firm of Downing & Emerson.

That, in December, 1868, that firm was dissolved; and from that time to August 16, 1869, William Downing carried on business on his individual account.

That on the 16th August, 1869, Downing failed—committed an act of bankruptcy—by making an assignment of all his property for the benefit of his creditors.

That he was thereafter proceeded against and adjudged a bankrupt, and was then liable to two distinct classes of creditors:

1st. To his private or individual creditors, who had sold him merchandise or loaned him money subsequent to the dissolution of the firm, and on his individual credit.

2d. To the copartnership creditors, who held him as jointly liable with his former partner (Emerson) on the unpaid debts of Downing & Emerson.

That both classes of creditors proved claims and voted in the election of assignee.

That these proceedings in bankruptcy were against Downing individually, and not against the firm.

That under these proceedings in bankruptcy Allen, the appellee, was chosen assignee; and under the assignment made to him, which conveyed to him no part of the partnership assets, but only Downing's individual property, together with his share of the surplus of the partnership property, if any there was, after the payment of the partnership debts, and the settlement of the partnership accounts, (Parker *v.* Muggridge, 3 Story, 334,) received and now holds $60,000, the proceeds of the sale of property which belonged to William Downing individually on the 16th August, 1869.

That when the assignee presented his final account, and the time had arrived for declaring a dividend, the individual creditors of the bankrupt appeared before the register and filed a motion, praying that they be first paid in full out of the assets in the hands of the assignee, and that only the surplus, if any remained, should be distributed to the partnership creditors.

That the partnership creditors did not appear to oppose this motion, but that it was opposed by the assignee in his official capacity.

That the facts were agreed upon, and, by consent of both parties, a special case was stated and certified by the register to the district court for an opinion.

That after hearing the parties the district court granted the motion.

That the assignee excepted to this finding of the district court, and took the case, by appeal, to the circuit court.

That the circuit court reversed the finding of the district court, and the individual creditors appealed from the finding or judgment of the circuit court to this court.

Upon this statement of the case it cannot be claimed that it is, in any strict sense, a suit at law or in equity under the second clause of the second section; but if it ap-

pears by the record that the circuit court had no jurisdiction in the case, either from the nature of the case or the want of proper parties, or by reason of any informality of the proceedings, we respectfully submit that this court, in passing upon those questions, may, as it has heretofore done, so far examine the merits of the case as to render future litigation in the premises impossible.

BRIEF ON THE MOTION TO DISMISS.

This case does not arise under the first clause of the second section of the bankrupt laws, but under the second clause of the sixth section.

14 Stats. at Large, 518; Bankrupt Laws of 1867.

The appeal to the circuit court under that section was rightly taken.

The parties had submitted a case stated to the decision of the district court, as provided in that clause, reserved their right of appeal, prosecuted it on appeal in due form, and the judgment of the district court was final on the rights of the appellants in the sense of the law of appeal.

The clause implies that an appeal *may* exist in such a case. It does not require that it should be given in terms, but "allowed" by the act.

Whether a statute excepts a given case from the general appellate jurisdiction, is matter of construction and intendment. The appeal need not be given or excluded in terms.

Duroussen *v.* United States, 6 Cranch, 307.

Clifford, J., in Morgan *v.* Thornhill, 11 Wall., 78.

The provision of section 8, making appeals to the circuit court dependent on the amount of the "debt or damages claimed," is confined to the appeal expressly given in the 2d section of the act, outside of the bankrupt proceedings between the assignee and persons claiming property adversely.

Ruddick *v.* Billing, 3 Bank. Reg., 14.

If an appeal to the circuit court did not lie, this case

cannot be brought under the provisions of the 1st clause of the 2d section.

1st. Because the supervisory power of the circuit court, conferred by that section, can only be invoked by a "party aggrieved" by a finding or judgment of the district court.

The assignee could not be "aggrieved" by any order or judgment of the district court directing the payment of a dividend, or the distribution of the funds to and among the creditors, unless it affected the items of his account.

The claim embraced in the motion of the individual creditors, to have their claims paid in full out of the assets, was not that of persons "claiming an adverse interest" against the assignee, but merely an application to regulate the final distribution of the estate.

A compliance with the order of the district court on that motion would not have deprived the estate of any fund to which it was entitled, nor subjected the assignee to any liability, nor imposed upon him any responsibility; such an order would not deprive him of any right nor impose upon him any loss.

A compliance with it could not affect him injuriously, a reversal if it could not benefit him.

The only parties "aggrieved" by the order of the district court were the copartnership creditors, and they have taken no action in the matter.

The assignee has proceeded on the ground that he had a legal right of appeal, and did not attempt to move under the first clause of section 2, and has nowhere claimed that he is a party aggrieved by the decision of the district court.

2d. The only way in which the circuit court can exercise its supervisory power under section 2 is by original petition, bill, or by *certiorari*.

In re Reed, 2 Bank. Reg., 2.
Ruddick *v.* Billings, 3 Bank. Reg., 14.

It cannot be exercised upon appeal or writ of error.

Ruddick *v.* Billings, 3 B. R., 14.
Barnard *v.* Eaton, 2 Cush., (Mass.,) 294.
Palmer *v.* Dayton, 4 *Ib.*, 270.

In the case at bar, the assignee did not apply to the circuit, by petition, bill, or other proper process.

Assuming, therefore, that the assignee might have applied to the circuit court, by petition, bill, or other proper process, he has failed to do so, and the circuit court never obtained supervisory jurisdiction in the case.

3d. Assuming, however, that the assignee was a proper person to apply for the exercise of the supervisory power of the circuit court, and that his application was in proper form, we further submit that this is not a case in which that power could be exercised on any application from him.

The second clause of the 6th section of the bankrupt law provides, that parties concerned in any bankruptcy proceeding may, at any stage, "by consent, state any ques-'tion or questions, in a special case, for the opinion of the 'court; and the judgment of the court shall be final, un-'less it be agreed and stated in such special case that either 'party may appeal, if, in such case, an appeal is allowed 'by this act."

By reference to the record (p. 2) it will be seen, that by consent of the assignee and the individual creditors, the facts were agreed and the question stated, as a special case, for the opinion of the district court. (Printed Record, pp. 3 and 4.)

If no right of appeal existed, the judgment of the district court under this agreement was final, and could not be disturbed by either party to that agreement.

We therefore submit if no right of appeal existed—

1st. That the assignee was not a party aggrieved under sec. 2 of the bankrupt act, and could not apply to the circuit court in this case.

2d. That no proper application, as contemplated by that section, was ever made to the circuit court.

3d. That, inasmuch as this case comes under the second clause of the sixth section of the act, the judgment of the district court, under the agreement of the parties, is final, and cannot be reviewed upon any application of either party to the record.

4th. That the proceedings in the circuit were void, and that the judgment of the district court must be affirmed.

U. S. *v.* Nourse, 6 Pet., 470.

BRIEF ON THE MERITS.

I. The facts set out in the record show that the assets now in the hands of the assignee come from the individual property of William Downing and ought to be distributed, under the bankrupt act, so as to pay his individual creditors in full, before the partnership creditors can receive any dividend.

14 Stats. at Large, 518, § 36.
In re Byrne, 1 Bank. Reg., 122.
In re Montgomery, 3 Bank. Reg., 109.
Howe v. Lawrence, 9 Cush., (Mass.,) 555.
Robb *v.* Mudge, 14 Gray, 534.
Barclay *v.* Phelps, 4 Met., (Mass.,) 397.
Agawam Bank *v.* Morris, 4 Cush., (Mass.,) 99.
In re William Ingalls, 5 Law Rep., 401.
In re Williams, ib., 402.

This is the general rule, to which, under the English law, there are three exceptions, viz:

1st. Where a joint creditor petitions for a separate fiat or adjudication of bankruptcy.

Ex parte Hall, 9 Ves., 349.
Ex parte Buckle, 1 Glyn & J., 34.

Upon this the record is silent; it ~~merely states~~, (p. 3 printed record,) that Downing was proceeded against. It was, ~~in fact, by a separate or~~ individual creditor.

The burden would seem to be on the party relying on the exception.

2d. Where there is no joint estate, and no solvent partner.

3d. Where there are no separate debts.

The second exception has been expressly repudiated in this country.

Howe *v.* Lawrence, 9 Cush., 553.
Ex parte Byrne, 16 Am. L. Reg., 499; S. C., 1 Bank. Reg., 122.
Murrill *v.* Neill, 8 How., 425–427.
McCulloch *v.* Doshnelle, 1 Har. & Gill, 105.

The general rule must, on the weight of authority, be considered the rule in this country, without the second exception.

Under this rule the judgment of the circuit court was erroneous.

II. The application of this rule in the case at bar is not prevented by the fact that Downing agreed to pay the partnership debts at the time of the dissolution of the firm.

In order to give any effect to this agreement, so far as the creditors were concerned, they should have accepted him as their separate debtor before his bankruptcy.

Col. on Part. §§ 904, 905.
Robb *v.* Mudge, 14 Gray, 554.
See also *Ex parte* Freeman, Buck, 471.
Ex parte Frye, 1 Glyn & J., 96.
Ex parte Appleby, 2 Dea., 482.

Nor by the agreement, (pages 3 and 4, printed Record,) made and sent by Downing to his partnership creditors after he had committed an act of bankruptcy.

That agreement does not appear to have been accepted by those creditors; no proof appears to have been made under it; and besides it was fraudulent.

EDWARD AVERY,
Of Counsel for Hall & Blasland and others, individual creditors of William Downing.

Supreme Court of the United States.

DECEMBER TERM, 1870.—No. 267.

HALL AND BLASLAND et als., Appellants,

vs.

JOHN A. ALLEN, Assignee of William Downing, a Bankrupt, Appellee.

BRIEF FOR APPELLEE.

HENRY HITCHCOCK,
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Of Counsel.

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Supreme Court of the United States.

DECEMBER TERM, 1870.

HALL & BLASLAND ET AL., Appellants,
vs.
JOHN A. ALLEN, Assignee of William Downing, a bankrupt, Appellee.
No. 267.

BRIEF FOR APPELLEE ON MOTION TO DISMISS.

So much of the record as is pertinent to this motion is fully stated in the motion itself, in support of which the following is respectfully submitted:

It was decided by this court, without dissent, in the case of Morgan *v.* Thornhill, (11 Wall., 65,) that no appeal lies to this court from a decree of the United States Circuit Court, exercising the supervisory jurisdiction conferred upon it by the first clause of the second section of the Bankrupt Act of March 2, 1867. In arriving at this conclusion the court, construing the second and ninth sections of said act, held, in substance, *inter alia:*

That the supervisory jurisdiction of the circuit court, under the first clause of the second section, is other and different from the concurrent jurisdiction conferred on it by the third clause of said 2d section. (11 Wall., 76.)

That such controversies only are cognizable, either in the Circuit or the District Court, under the 3d clause of the second section, whether at law or in equity, which arise between an assignee in bankruptcy, on the one hand, and some *person claiming an adverse interest* on the other, touching some property, or

right of property of the bankrupt, transferable to or vested in such assignee: and that only such a suit, between such parties, touching such subject-matter, having proceeded to a final judgment or decree in the Circuit Court, the matter in dispute also exceeding $2,000, may be removed into this court by writ of error or appeal. (*Ib.*, pp. 75, 76.)

That the concurrent jurisdiction so conferred on the circuit court by the third clause of the second section, is none other than the regular jurisdiction between party and party, (being also such parties as above stated,) as described in the judiciary act, and the third article of the constitution. (*Ib.*, p. 80.)

That the jurisdiction conferred on the circuit court by the first clause of the second section is wholly distinct from the foregoing, the revision contemplated by said first clause being evidently of a special and summary character, as appears from the words "general superintendence," preceding and qualifying the word "jurisdiction," and more clearly from the fact that the jurisdiction extends to *mere questions*, as contradistinguished from judgments or decrees, as well as to cases, and that the jurisdiction may be exercised in chambers as well as in court, and in vacation as well as in term time. (*Ib.*, p. 80.)

And that Congress did not intend that an appeal from the decision of any case or question, under the first clause of the second section, should be allowed to this court. (*Ib.*, p. 81.)

Applying the law thus settled, appellee contends:

I. The matter in controversy here is not within the jurisdiction conferred on either the District or the Circuit Court by the third clause of the second section of the Bankrupt Act. It is a mere "question" arising in the course of the administration of the bankrupt's estate, and clearly within the supervisory jurisdiction of the Circuit Court, under the first clause of the second section; which being so, no appeal lay to this court, and the motion to dismiss for want of jurisdiction must prevail.

1. The proceeding below, from the Circuit Court's decision of which this appeal was taken, it will not be claimed was a suit or action at law. Equally true is it that said proceeding was in no sense a suit in equity. It lacked the essential features of a suit in equity. It was a mere motion, (Record, p. 5,) by certain creditors, whose claims were duly proved and registered, for an order or direction to the assignee establishing their right to priority of pay-

ment as against certain other claims, also duly proved and registered.

See York's Case, 1 Abb. U. S. Rep., 509, 512.

2. Still less was this proceeding a suit by "any person 'claiming an adverse interest against the assignee touch-'ing any property or rights of property of said bankrupt, 'transferable to or vested in such assignee." (Section 2 of Bank. Act, 3d clause.)

A claim of priority is not a claim asserted against the bankrupt, but a right asserted against other creditors, and a decision adverse thereto is not a rejection of the creditor's demand; nor is such claim of priority the claim of any *adverse interest against the assignee*, such as required by 3d clause of section 2; for, however determined, it can neither increase nor diminish in his hands "any property or rights of property of said bankrupt, transferable to or vested in such assignee."

York's Case, 1 Abb. U. S. Rep., 503, 512.

In re Masterson, 4 Bank. Reg., 180.

3. The record shows (page 4) that this was simply a "question" of priority between creditors, arising in the course of the "single statutory proceeding" instituted against the bankrupt. The jurisdiction of the District Court here invoked was, on the face of it, *not* "the regular jurisdiction, between party and party," conferred by 3d clause, 2d section, concurrently on the District and Circuit Courts. If it had been, *the appellants could have raised the question of their alleged priority by a regular suit in equity in the Circuit Court*, which appellants will scarcely assert. It was the original jurisdiction for "the adjustment of the various priorities and conflicting interests of all parties," conferred on the District Courts by section 1 of Bankrupt Act, which was invoked by simple motion, which motion, together with an agreed statement of facts, was, at the request of all parties concerned, certified by the Register for its opinion to the District Court. (Record, pp. 2–4.) Of such questions the Circuit Court has under the act no jurisdiction

whatever, except the supervisory jurisdiction conferred by the 1st clause 2d section; and from the exercise of that jurisdiction lies no appeal here.

York's Case, 1 Abb. U. S. R., 508, 509, 513.
In re Alexander, 3 Bank. Reg., 6.
Morgan *v.* Thornhill, 11 Wall., 81.
U. S. Stats. at Large, vol. XIV, pp. 517, 518.

II. If the foregoing views are correct, this court, it is respectfully submitted, will dismiss the appeal without further considering any question raised or which may be raised here, in respect of the proceedings below. The proceeding here, is *coram non judice*. Where no statutory provision exists for a revision here of the proceedings of the Circuit Court, as in a criminal case, this court has declared itself not even authorized to express an opinion on such proceedings, no division of opinion having been certified.

Per Taney, C. J., *ex parte* Gordon, 1 Black, 505.
And see *ex parte* Christie, 3 How., 292, 322.
Also per Catron, J., S. C., 3 How., 323, referring to Nelson *v.* Carland, 1 How., 265; *ex parte* Dorr, 3 How., 103.

III. It may be asserted by the appellants, that this court, even though without jurisdiction to revise the exercise by the Circuit Court of its supervisory jurisdiction under first clause of 2d section of Bankrupt Act, may take cognizance of the form of the proceedings below, which, though then consented to, is now impugned by appellants.

Respectfully protesting against such inquiry here as extra-judicial, and its results *obiter dicta*, appellee insists:

1. The Circuit Court had complete revisory jurisdiction of the subject-matter of the "question" certified to and decided by the District Court.

11 Wallace, pp. 74, 75.
York's case, 1 Abb. U. S. R., 513.
In re Alexander, 3 Bank. Reg., 6.

2. Said court properly exercised said jurisdiction on appeal taken from the District Court.

(*a*) By first clause 2d section of Bankrupt Act, said court was authorized "on bill, petition, *or other proper process*," to hear and determine the question. The words "*or other* proper process," clearly imply that the supervisory jurisdiction of the Circuit Court may be invoked otherwise than by a formal bill or a petition. The only requirement is, that it be some "other proper process." Neither the act nor the Supreme Court, by rule or order in bankruptcy, has indicated what such other process should or may be: the Circuit Court must therefore prescribe the rule of practice. *Appeal* is the regular mode in equity of invoking a superior jurisdiction: if these words do not include appeal, when the controversy is of an equitable nature, they have no meaning.

Ruddick *v.* Billings, 3 Bank. Reg., 14.
In re Alexander, 3 Bank. Reg., 6.
In re Kerosene Oil Co., 2 *ib.*, 164.
1 Stat. at Large, p. 335, § 7; 4 *ib.*, 278, § 1.
3 Abb. Nat. Dig., p. 560, § 21.
Poultney *v.* Lafayette, 12 Peters, 472.
Boyle *v.* Zacharie, 6 Peters, 648.

(*b*) Section 8 of the act provides expressly (11 Wall., 78) for appellate jurisdiction in the Circuit Court in four classes of cases. But this does not exclude appeals otherwise provided for, as by the words "or other proper process;" nor does the opinion in Alexander's case conflict with this position.

The *dictum* in York's case, (1 Abb. U. S. R., 513,) per Woods, J., was unnecessary to the decision made, no reason for it is given, and it plainly ignored the words "or 'other proper process," by assuming that section 8 provided for all possible appeals.

In Ruddick *v.* Billings, (3 Bank. Reg., 14,) Miller, J., dismissed a *writ of error* in the District Court upon the question of revising a bankrupt's discharge; but this was solely

on the ground that the case presented *no question of law, but facts only*, for reviewing which *a writ of error* is not a "proper process." The principles there announced fully justify an appeal in the case at bar. That the whole case may be brought up to the Circuit Court by bill of exceptions, see Sutherland *v.* Kellogg, (3 Chicago Leg. News, 73,) cited Bump's Bankruptcy, p. 290.

3. *A fortiori* the appellants here cannot impugn the form of proceeding below, when, by their signature (Rec., p. 5) to the bill of exceptions, with waiver of affidavit and bond, and their voluntary appearance in the Circuit Court, argument and submission on the merits, they waived all questions of form and personal jurisdiction. The subject-matter was within the supervisory jurisdiction of the court. No formal bill in equity could have presented the case more completely than the bill of exceptions which their own counsel signed, and no process could be more effectual than their appearance in open court. They cannot ask this court, which has not even jurisdiction of the subject-matter by appeal, to question proceedings thus authenticated by themselves.

In re Ulrich, (3 B. Reg., 34,) 3 Benedict's R., 357.
Farrar *v.* United States, 3 Peters, 459.
Toland *v.* Sprague, 12 Peters, 300, 331
Patterson *v.* United States, 2 Wheaton, 221.

Respectfully submitted by

HENRY HITCHCOCK,
with LUBKE & PLAYER,
Of Counsel for Appellee.

Supreme Court of the United States.

HALL AND BLASLAND ET AL., Appellants,

vs.

JOHN A. ALLEN, Assignee of WILLIAM DOWNING, a bankrupt, Appellee.

No. 267.
December Term, 1770.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

STATEMENT OF THE CASE.

In this case the transcript of the record shows, that the appellants are creditors of the bankrupt, William Downing, who was adjudicated a bankrupt by the District Court of the United States for the eastern district of Missouri; that they appeared before the register in bankruptcy of that court, before whom the case of said Downing is pending, and filed a motion, calling for a decision, as to the rights of the different creditors of said bankrupt in the distribution of the estate of the bankrupt; that thereupon the appellee and appellants entered into an agreement, setting forth the facts upon which the decision was required. This agreement of facts is substantially as follows:

It is admitted by the appellants and appellee that the bankrupt William Downing and one Richard W. Emerson were copartners, under the firm name of Downing & Emerson, and as such were dealers in boots and shoes in the city of St. Louis, previous to December, 1868; that in the month of December, 1868, they dissolved by consent, Downing taking or purchasing the stock of goods and all other assets of

the firm, and agreeing to pay off and to discharge all of its liabilities, and executing and delivering to Emerson, for his (Emerson's) supposed interest in the concern, his notes, amounting to about $40,000; that said firm was then largely indebted, and actually insolvent; that, after the dissolution of said firm, Downing continued in his individual name, and for his individual account, to prosecute the business at the same place until the 16th day of August, 1869; that, while so doing business alone, Downing, in the regular course of business, disposed of part of said stock of goods, added to it by further purchases, paid off some of the liabilities of the old firm, and contracted further liabilities and debts in his own name alone; that on the 16th of August, 1869, Downing executed a conveyance or assignment of all his assets, including the assets which came from the firm of Downing & Emerson to him, to John W. Kennan, as trustee, for the equal benefit of all his individual creditors, and for the creditors of said firm; that the trustee (Kennan) thereafter disposed of the stock of goods, realizing about $60,000 for it, and, when he had done so, Downing was proceeded against, and adjudicated a bankrupt by the said district court; and that thereafter said Kennan paid over to the said assignee in bankruptcy, John A. Allen, the whole of the proceeds of the sale of said stock of goods; that the copartnership of Downing & Emerson was never adjudicated bankrupt as such, nor have the persons holding claims against it released Emerson from liability on such claims, but that Emerson has also been adjudicated a bankrupt in the State of Massachusetts; that claims against the bankrupt Downing individually, as well as claims against him as one of the said copartnership of Downing & Emerson, have been proven and allowed against his estate, without any distinction, except so far as the evidences of debt upon which the proofs were made would show any, and that all these creditors voted for the said assignee; that before he was adjudicated a bankrupt, and after the 16th of August, 1869, Downing executed and delivered to each one of the creditors of Downing & Emerson an agreement in the following form:

"Whereas the firm of Downing & Emerson, which was composed of William Downing and Richard W. Emerson, was, in the month of December, eighteen hundred and sixty-eight, dissolved; and whereas said Emerson assigned to said Downing all his, said Emerson's, interest in the property and assets of the said firm; and said Downing, in consideration thereof, gave said Emerson certain promissory notes, and agreed to assume and pay all the liabilities and debts of said firm of Downing & Emerson, and hold said Emerson harmless from the same, and I have agreed to pay the debts and liabilities of said firm as my own private individual debts, and the party with whom this agreement is made may now have debts and claims against said firm: Now, therefore, I, the said Downing, for value received by me of ———, the receipt whereof is hereby acknowledged, do hereby covenant and agree with said ——— that I, individually, will pay as my own private and individual debts, all and singular the debts, liabilities, and claims against said firm of Downing & Emerson held by said ———. Witness my hand and seal this — day of September, 1869."

At a meeting of the creditors of said William Downing, called by and held before said Register, for the purpose of distributing the said $60,000, the appellants, who became creditors after the dissolution of the firm of Downing & Emerson, filed the motion referred to, insisting that they and other individual creditors of Downing were alone entitled to share in the distribution of said fund; while, on the other hand, those of the creditors who held claims against Downing & Emerson made the same claim, on the ground that the fund came from the partnership originally, and remained partnership property until the partnership debts are paid.

The Register certified this motion and agreement of facts into the District Court for the opinion of the court, in accordance with section 6 of the Bankrupt Act, both parties reserving the right of appeal.

In the argument of the question in the District Court it was further admitted that Downing was adjudicated a bankrupt upon the petition of an individual creditor. The District Court, on the 25th of March, 1870, gave the following opinion:

"Upon the facts submitted, the Court rules that the separate creditors of the

bankrupt must be first paid in full before the partnership creditors can receive any dividend from the funds in the hands of the assignee.

"SAMUEL TREAT.
"*Judge.*"

To this ruling the assignee excepted, and in due time presented his bill of exceptions, which was signed, and, on the 1st of April, 1870, perfected an appeal to the Circuit Court for the districts of Missouri. That court heard the case, and, on the 26th of April, 1870, reversed the judgment of the District Court, and ordered the assignee to make an equal distribution of the estate among all the creditors whose claims had been duly established and registered. From this decision the appellants perfected an appeal to this court on the 17th day of May, 1870.

POINTS AND AUTHORITIES FOR APPELLEE.

I. By the transfer from Emerson to Downing all the partnership property became the individual property of Downing, discharged of any equitable lien upon it in favor of the partnership creditors.

(*a*) The transfer was *bona fide:*

(*b*) It was for a valuable consideration, *i. e.*, the notes for $40,000 and Downing's undertakings with reference to the partnership liabilities:

(*c*) And it does not matter that the partnership was insolvent at the time.

Story on Partnership, (6th edition,) § 358, § 372, and cases cited, particularly—
Ex parte Peake, 1 Madd., 346.
Ex parte Ruffin, 6 Vesey, 119–127.
Ex parte Williams, 11 Vesey, 3.
Sage *v.* Chollar, 21 Barb., 596.
Bullitt *v.* Methodist Episcopal Church, 26 Penn. St., 108.
Hilliard on Bankruptcy, p. 64, § 20.

II. By the statute of Missouri, where these partnership debts were contracted, the liabilities of the partnership are

also separate liabilities of each partner. (*See* chapter 87, pp. 397 and 398, of the Revised Statutes of Missouri of 1865.)

"SEC. 1. All contracts which by the common law are joint only shall be construed to be joint and several."

"SEC. 4. In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable."

III. The creditors of the partnership were entitled to prove their claims against the bankrupt's estate, under the Bankrupt Act of 1867, independent of the above statute of the State.

See sec. 19, and read it with par. 2 of sec. 33.

(*a*) By sec. 19 "all debts" of the bankrupt, without limitation as to character, are provable against his estate.

(*b*) And by section 33 it is provided, that one partner may be discharged from partnership debts, leaving the other partners liable for the whole; thus contemplating individual bankruptcies of one partner, and a discharge from all debts, which necessarily assumes the right of creditors to prove partnership demands against the individual estate of one partner.

See *In re* Melick, 4 Bank. Reg., 26.
Tucker *v.* Oxley, 5 Cranch, 39.

IV. The true construction of the Bankrupt Act of 1867 must be such that in this case all the creditors of the bankrupt will be entitled to share equally in the distribution of his estate, whether their demands were originally partnership liabilities or originally individual liabilities only.

(*a*) We have shown that, under the statute of Missouri, as well as the Bankrupt Act itself, they were entitled to prove their claims all alike; and it is admitted that they have done so.

Now, by section 27 of the existing Bankrupt Act (of 1867) it is provided:

"That *all creditors*, whose debts are duly proved and allowed, shall be entitled to share in the bankrupt's property and estate *pro rata*."

This provision of the Bankrupt Act applies exclusively to the administration in bankruptcy upon the estate of an INDIVIDUAL bankrupt; not the estate of a bankrupt PARTNERSHIP.

(*b*) by section 36 of the Bankrupt Act of 1867, it is provided:

"That where *two or more* persons, who are *partners in trade*, shall be adjudged bankrupt, * * * all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken"

and separate accounts kept thereof by the assignee; and that the following distribution shall be made:

"And after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and, if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and, if there shall be any balance of the joint stock after the payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts."

This last provision necessarily applies exclusively to *partnership* estates, and cannot apply to the case at bar—

1st. Because the case at bar is an individual bankruptcy.

2d. Because in it there is no partnership in existence.

3d. *Because in the case at bar it is admitted that there is no joint estate in existence to which the rule can be applied*

The appellee insists that the existence of a joint estate must be shown before section 36 can have any force or application.

This construction of the Bankrupt Act was given to it by the court below, (see appendix,) and in the following cases:

In re Melick, 4 Bank. Reg., p. 26.

In re Jewett, 1 Bank. Reg., p. 130.

In fact, there is no room for construction. The statute is plain, and the courts must enforce its language.

United States *v.* Fisher, 2 Cranch, 358.

V. Appellants claim that section 36 of the Bankrupt Act must be applied to the case at bar.

Independent of the construction above contended for, the appellee submits the following as additional reasons why the claim of the appellants is founded in error:

In the old English statutes concerning bankrupteies there was no provision relating to the adjudication of bankruptcy against copartners as such, and the distribution of their estates and the partnership estate.

There is but one provision in them relating to dividends, and that is like section 27 of the present Bankrupt Act.

Cook's Bankruptcy, vol. 1, p. 92.

The English chancellors, therefore, in applying this one provision to partnership estates and partnership liabilities, laid down a rule which is like that contained in section 36 of the present bankrupt act, but made three so-called "exceptions" to it. These were—

1st. Where a joint creditor was the petitioner for a separate commission against the bankrupt partner.

2d. *Where there was no joint estate, and no living solvent partner.*

3d. Where there were no separate debts.

When these "exceptions" existed the rule fixed by the chancellors had no effect, and all the creditors (joint and separate) shared *pari passu* in the estate of the bankrupt partner.

Story on Partnership, (6th edition,) §§ 363, 378, 380, and cases cited.

Collyer on Partnership, (Perkins' edition,) § 923, p. 778.

The United States Bankrupt Act of 1841 (see sections 5 and 14) contains rules of distribution of individual and partnership estates, similar to those above cited from the present Bankrupt Act.

Under this act of 1841, Ware, J., left it an open question—

"Whether under the bankrupt act of 1841 the creditors of a partnership can be allowed to prove claims against the separate estate of one of the partners to receive dividends, in concurrence with the separate creditors of the partner, when there is no joint estate and living solvent partner." (*In re* Marwick, Davies, p. 229.)

We have not been able to find any other reported case under the act of 1841.

The Massachusetts insolvent law (see sections 12 and 21, ch. 163, St. 1838,) also contains rules of distribution similar to those contained in the present United States Bankrupt Act.

The Courts of Massachusetts, under the insolvent law of that State, have held, that although these "exceptions" be shown to exist, yet the individual creditors are entitled to priority in the distribution.

Howe *v.* Lawrence,
9 Cushing, 553.
13 Gray, 121.
14 Gray, 537.

The opinion of the court in 9 Cushing, on this question, being as follows:

"The remaining question presented is, as to the right of the joint creditors of the firm to prove their debts against the separate estate of Gardner, and take dividends thereon *pari passu* with the separate creditors. This claim is founded upon the recognized exception to the general rule of applying joint estate to the payment of joint debts, and separate estate to the payment of separate debts, which has been established by the English courts in bankruptcy. That exception is, when there is no joint estate and no solvent partner, the joint creditors are allowed to prove and share equally with the separate creditors in the separate estate. It is a sufficient answer to this claim of the petitioners, that the statute of 1838, ch. 163, § 21, recognized no such exception to the rule therein prescribed for the distribution of the assets of insolvent debtors. The rule is distinct and peremptory, requiring the net proceeds of the joint stock to be appropriated to pay the creditors of the firm, and the net proceeds of the separate estate of each partner to be appropriated to the payment of the separate creditors. This provision was reported by the learned commissioners who drafted the insolvent act, and enacted by the legislature, with a full knowledge of the exceptions which had been engrafted on the general rule of distribution by the course of judicial decisions in England. They designedly omitted them."

Appellants may claim that this construction of the Massachusetts insolvent law must govern in the construction of the United States bankrupt act of 1867, because the United

States act is later than the Massachusetts law, and because these provisions in them are similar; and, for that reason, it must be presumed that Congress intended to adopt the construction of the Massachusetts courts also.

As to this claim we submit—

1st. That although it has been stated that

"It is reasonable to suppose that where a British statute is re-enacted in this country, we adopt the settled construction it has received as well as the statute itself," (see opinion of Marshall, Ch. J., in Kirkpatrick *v.* Gibson, 2 Brock., p. 388,)

no reported case can be found wherein this Court has held, that in the construction of a United States statute it is bound by the construction given to a similar State statute by a State court.

2d. That no absolute rule of construction of statutes is laid down by the writers, binding this or any other (except the Massachusetts) court to the construction thus given.

3d. That, therefore, this court is bound to review the Massachusetts decisions, and if they are shown to be erroneous, to reject them as it would any other bad authority.

We insist that the decision in 9 Cushing, above quoted, cannot bear critical examination; and that such examination will demonstrate that the court, in that case, did not ascertain the real intent of the legislature.

This intent is a *fact*, which must be gathered from the statute itself in the first instance; and if the language of that is sufficient, the court must obey that language.

Sedgwick on Stat. and Const. Law, p. 229.

The errors of the opinion in 9 Cushing are—

1st. That it holds that there is no joint fund and no partnership in existence to which section 21 of the insolvent act could apply; and that it then does apply that section, when the legislature have said that another section (12) of the act should be applied.

2d. That it assumes that all three of the "exceptions" above stated are exceptions in fact.

To show that they are not all exceptions in fact, we will quote the language of Mr. Parsons. He says, speaking of the rule established by the English chancellors, (and the same which is contained in section 27 of the Massachusetts law:)

"This rule can apply only when there are matters to which it can apply; as where there are joint debts and joint funds, and also several debts and several funds. It is, therefore, not properly an exception to the rule, where there is no joint estate or no living solvent partner, or where there are no separate debts. These cases, which are sometimes called exceptions to the rule, should rather be thought to fall without the rule. There is, however, one technical exception recognized in England: when a creditor of the partnership is a petitioner for a separate commission against a bankrupt partner, which rests there on technical reason, that a commission of bankruptcy is at once an action and an execution. This rule has not been recognized in practice in this country so far as we know; nor does it seem to us to be supported by any substantial reasons or principles derivable from the law of bankruptcy in relation to partnership." (Parsons on Partnership, pp. 482, 483.)

Lastly. That in the opinion the Court supports itself by evidence *aliunde*, (the action of the commissioners who drafted the insolvent act,) when it had not exhausted all means of consideration found within the act itself. We apprehend that this Court cannot say that Congress "designedly" omitted to mention these so-called exceptions; nor could this Court assert as a matter of fact that a majority of the members of Congress knew of any such "exceptions."

The other decisions cited from the Massachusetts Reports are founded upon the decision in 9 Cushing.

That there is no joint estate is admitted by the agreement of facts in this case. It is said that Downing acquired all of Emerson's interest "in the stock of goods and other assets" of the firm. It is also admitted that Emerson is alive, and a bankrupt. This bankruptcy brings the case within the rule requiring "no solvent living partner."

Ex parte Jansen, 3 Maddock's Reports, 123.

VI. But the order of the circuit court must be affirmed, upon the ground that the firm creditors, by the undertakings of Downing, when he acquired the firm assets, became individual creditors of Downing's.

(*a*) Upon the dissolution, the partnership debts ceased to have that technical qualification, and they became the individual debts of the several partners.

(*b*) As between the partners, Downing was the sole debtor.

(*c*) The firm creditors can treat Downing's promise to Emerson as having been made for their benefit, and they can recover on it, although the consideration did not move from them.

1. Pars. on Cont., 467–468, (5th edition.)
2 Greenl. on Ev., sec. 109.
Lawrence *vs.* Fox, 20 (6 Smith) N. Y., 268, and cases cited.
Steman *vs.* Harrison, 42 Penn. St., p. 49.

And this principle should be favored in this case, because this case should be decided in accordance with the principles of equity.

VII. The agreement executed by Downing to the different firm creditors in September, 1869, being *prima facie* for a valuable consideration, entitles them to share *pari passu* in the distribution of the estate.

Story on Partnership, § 359, (6th edition.)
Gowan on Partnership, (3d edition) p. 254 and cases cited.

Respectfully submitted by

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their benefit. In equity, the promise which Downing made to Emerson to pay these debts could be enforced against him; and this controversy is to be decided upon equitable principles. Indeed, a promise by one to another, for the benefit of a third person, may, according to the prevailing American doctrine, be enforced at law in the name of the latter; especially where, as the case at bar, the promisor receives a fund or property with which to make such payment.

"In this country," says Mr. Parsons, "the right of a third party to bring an action on a promise made to another for his benefit seems to be somewhat more positively asserted, and we think it would be safe to consider this the prevailing rule with us; indeed, it has been held that such a promise is to be deemed made with a third party, if adopted by him, though he was not cognizant of it when made." (Parsons' Cont., 467, 468, 5th ed., and cases cited.)

"After some conflict of opinion, it seems now to be settled in cases of simple contract, that if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration did not move from him." (2 Greenl. Ev., sec. 109, and cases there cited.)

That Downing received, in the surrender to him of the assets, a sufficient consideration for his promise, cannot be disputed.

By this promise he is bound, and the creditors of the firm are, in equity, entitled to enforce it against him. It is, on their election to avail themselves of it, cumulative to their other rights. They need not release the firm in order to be able to get the benefit of this promise made by one of its members for their benefit. If Downing had secured this promise by mortgage, can it be doubted that equity (aside from the bankruptcy) would give the creditors the benefit of his security, if they desired it? The right of the creditors given by the arrangement between Downing and Emerson is not defeated by the subsequent bankruptcy of Downing. They may assent to and claim the benefit of it at any time, either before or after bankruptcy of their debtor.

I look upon their rights in equity as being the same as if Downing had individually indorsed the pre-existing firm paper, in which case they could have proved their debts against either, if not, indeed, against both the firm and Downing.

It would be strange if the partners could, by the same transaction, make the assets individual property; but could not with the assent of the creditors make one of the firm

debtors also individually liable. It carries out the contract precisely, to hold that the parties made the property the individual property of Downing, and that the latter superadded to the existing liability to the creditors his individual liability.

But, if the foregoing view should be erroneous, I am of opinion that the same result is reached by the true construction of the bankrupt act of 1867.

In the case at bar, it will be remembered, the partnership had ceased to exist. There were no firm assets. Both of the members of the firm were separated, in bankruptcy, and insolvent. Under these circumstances the creditors of the former firm of Downing & Emerson had, under section 19 of the bankrupt act, a right to prove their debts against the estate of Downing, especially as he had, for a valuable consideration, assumed to pay them. If no proceedings are taken against the partnership, under section 36 of the bankrupt act, (which contemplates cases where there are both firm and individual assets and debts,) firm debts may, as stated, be proved under section 19; are entitled to share *pro rata* under section 27, as they extend to "all creditors whose debts are duly proved;" and are embraced in the discharge and provided for in sections 32, 33, and 34. These sections provide for a discharge from "all debts and claims;" and the use of the word "partner" in section 33 shows that it was contemplated that one partner might, under the antecedent provisions of the act, be entitled to be discharged for or in respect of partnership debts.

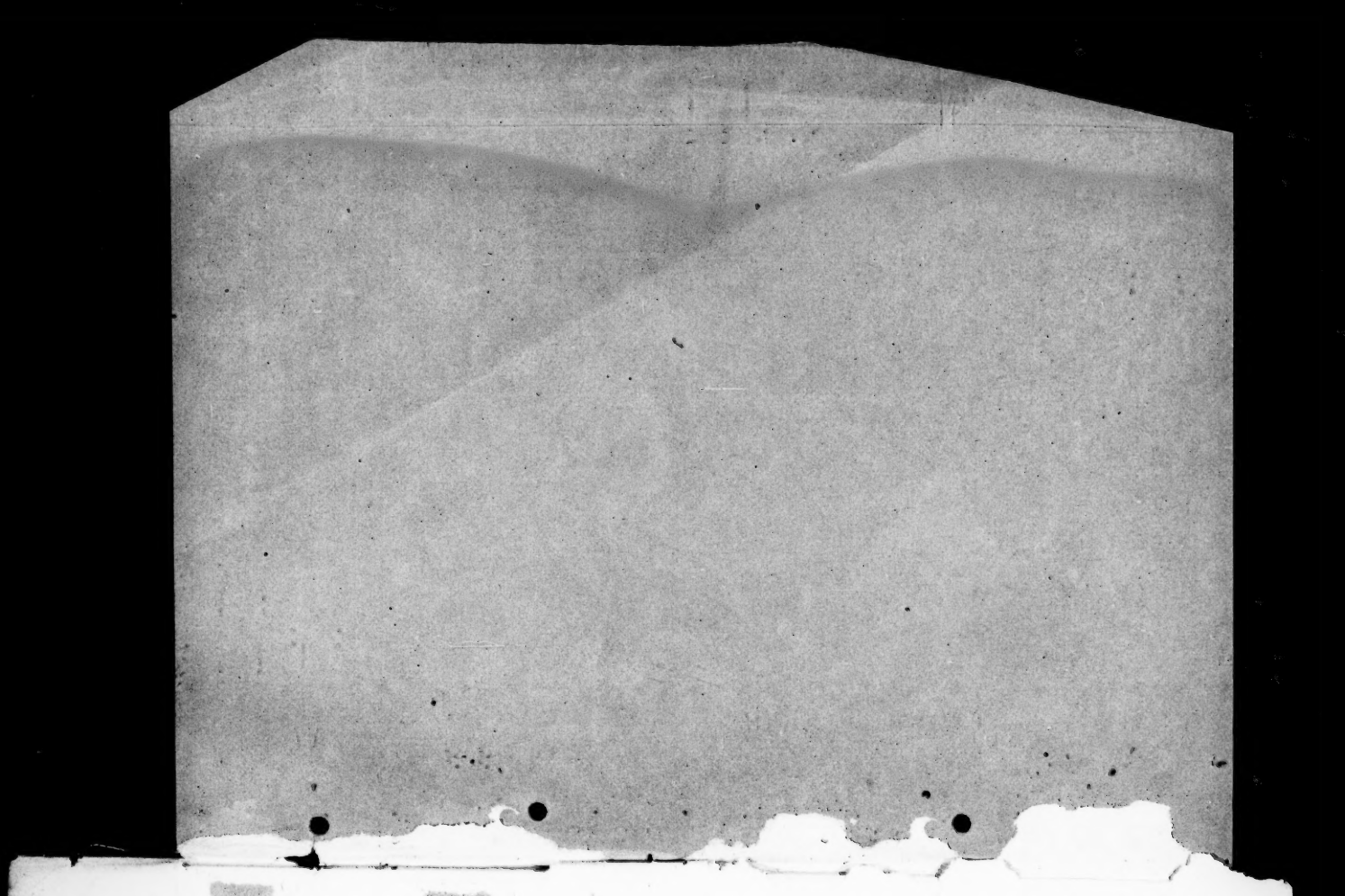
In other words, section 36 of the bankrupt act only comes into operation when there are firm assets and the proceedings are instituted against the firm and each of its members, in which case the assets are to be marshaled according to the equity rule, firm creditors to have priority as respects the joint assets and individual creditors as respects the separate estate of his debtor.

This construction of the bankrupt act has the merit of producing that equality which it is the leading and manifest purpose of the act to secure, and in effect reaches the result which the English chancellors have felt bound by equitable principles to adopt, viz, that where there is no joint estate and no solvent partner, all the creditors, joint and separate, shall share *pari passu* in the estate of the bankrupt partner.

Upon the facts submitted, this court is of the opinion that all of the creditors of the said bankrupt who had proved their claims before the register were and are entitled to share *pro rata* in the distribution of the estate of the bank-

rupt, whether their debts were originally against the firm of Downing & Emerson or against the said Downing individually. This court is, therefore, of the opinion that the court below erred in holding that the individual creditors of Downing were entitled to priority; and its judgment is reversed, and the assignee ordered to make an equal distribution of the estate among all the creditors whose claims have been duly established and registered.

Judge Krekel concurs. (See p. 33 of vol. 1 of Dillon's Cir. Ct. Reports.)



Bank act

Sec 5

Conveyance the
partnership books

Not a sufficient law or
in equity -

Woodworth 380
1 Clark & Hall 503
572 - 573

Story on Part
Gow on Part - 254
4 Cush -
If does not dominate either
Sec 36 -
5 Gray
Parsons on Part 482